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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

THE BOEING COMPANY,

Petitioner,

v.

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS
BOARD, and DEPARTMENT OF ECOLOGY,

Respondents;

COPPER DEVELOPMENT ASSOCIATION, INC., THE
INTERNATIONAL COPPER ASSOCIATION, LTD., OLYMPIANS
FOR PUBLIC ACCOUNTABILITY, PUGET SOUNDKEEPER
ALLIANCE, COLUMBIA RIVERKEEPER, and ARTHUR WEST,
Appellants Below; PORT OF OLYMPIA, Respondent Below; and
WEYERHAEUSER NR COMPANY, Intervenor Below.

REPLY BRIEF OF PETITIONER THE BOEING COMPANY

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT.....	3
A. Ecology and PSA Defend a PCHB Interpretation of the Statutory Presumption of Compliance That is Patently Unreasonable	3
1. Boeing’s interpretation of the statutory presumption of compliance is the only reasonable interpretation	3
2. The Board’s, Ecology’s, and PSA’s interpretation of “all permit conditions” in RCW 90.48.555(6)(a) is unreasonable because it renders meaningless the presumption of compliance.....	6
3. Respondents completely ignore the “site specific information” exception to the presumption of compliance	11
4. RCW 90.48.555(6)(b) and the SWMMs are not intended to ensure compliance solely with technology- based requirements	16
B. The Fecal Coliform Effluent Limitation Issue is Moot	20
III. CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases	Page
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2004)	4
<i>Dot Foods v. Dep't of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009)	3
<i>Five Corners Family Farmers v. State of Washington</i> , 173 Wn.2d 296, 268 P.3d 892 (2011)	3, 4
<i>Flight Options v. Dep't of Revenue</i> , 172 Wn.2d 487, 259 P.3d 234 (2011)	17
<i>Santa Monica Baykeeper v. Kramer Metals, Inc.</i> , 619 F. Supp. 2d 914, (C.D. Cal. 2009)	9
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001)	3
 Statutes	
RCW 90.48.080	14
RCW 90.48.555	9, 17
RCW 90.48.555(6)	passim
RCW 90.48.555(6)(a)	passim
RCW 90.48.555(6)(b)	passim
RCW 90.48.555(7)(a)	20
RCW 90.48.555(8)(a)	4, 8
RCW 90.48.555(9)	passim
RCW 90.48.555(10)	passim
 Regulations	
WAC 173-226-080(1)(e)	14
WAC 173-226-080(1)(f)	14
WAC 173-226-080(1)(g)	14
WAC 173-226-230	14
WAC 173-226-240	14
WSR 03-15-091	17

I. INTRODUCTION

In this appeal, this Court must interpret the presumption of compliance with water quality standards set forth in RCW 90.48.555(6), as applied to the Industrial Stormwater General Permit (“ISGP” or “Permit”). The language of RCW 90.48.555(6) is unambiguous. Boeing’s interpretation of RCW 90.48.555(6) is the only reasonable interpretation of the statute. It is the only interpretation that views the statute as a whole, harmonizing all of its provisions. Under the plain language of RCW 90.48.555(6), an ISGP permittee that has progressed through all three of the Permit’s corrective action levels, has repeatedly revised its stormwater pollution prevention plan, and has implemented all applicable and appropriate best management practices (“BMP”) contained in the Department of Ecology’s Stormwater Management Manuals (“SWMMs”) must be presumed to be in compliance with state water quality standards.

The interpretation of RCW 90.48.555(6) offered by the Pollution Control Hearings Board (“PCHB” or “the Board”), the Department of Ecology (“Ecology”), and Puget Soundkeeper Alliance, Columbia Riverkeeper and Olympians for Public Accountability (collectively “PSA”), on the other hand, is patently unreasonable. Their interpretation of the “in full compliance with all permit conditions” language in RCW 90.48.555(6)(a) and the ISGP’s corrective action provisions renders

meaningless the specific provision of RCW 90.48.555(6)(b) conditioning the presumption on the implementation of all applicable and appropriate BMPs contained in the SWMMs (or demonstrably equivalent thereto). Moreover, Ecology's and PSA's position that RCW 90.48.555(6)(a) constitutes the sole means by which the statute ensures compliance with water quality standards ignores entirely both the "site specific information" exception to the presumption of compliance, and the authority granted to Ecology under RCW 90.48.555(9) and RCW 90.48.555(10) to take administrative action when presented with site specific evidence of a potential violation of water quality standards.

Finally, there is simply no basis available or presented for PSA's and Ecology's assertions that Boeing seeks to avoid compliance with water quality standards, or that RCW 90.48.555(6)(b) and the SWMMs address only "technology-based" stormwater effluent limits and not "water quality-based" limits. The statutory presumption is, after all, a presumption of compliance with *water quality* standards.

This Court should reject the PCHB's erroneous interpretation of RCW 90.48.555(6), and set aside the PCHB's rulings regarding the statutory presumption of compliance. The Court need not address the fecal coliform issue raised in Boeing's appeal; Boeing agrees with

Ecology that its challenge to the ISGP fecal coliform effluent limit is now moot.

II. ARGUMENT

A. Ecology and PSA Defend a PCHB Interpretation of the Statutory Presumption of Compliance That is Patently Unreasonable.

1. Boeing's interpretation of the statutory presumption of compliance is the only reasonable interpretation.

A court's fundamental objective when interpreting a statute is "to discern and implement the intent of the legislature," glean[ing] the plain meaning of the statute "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). The court must view each provision of the statute in relation to other provisions, and construe the statute such that *all* language is given effect, with no portion rendered meaningless or superfluous. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Where, after this analysis, the Court finds that there is only one reasonable interpretation of the statute, that interpretation is the plain meaning of the statute. *Five Corners*, 173 Wn.2d at 313.¹

¹ No party to this appeal asserts that RCW 90.48.555(6) is ambiguous. Because RCW 90.48.555(6) is not ambiguous, the PCHB's interpretation of the statute is not entitled to deference. *Dot Foods v. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). Only where a statute is susceptible to two or more *reasonable* interpretations is it

Boeing puts forth the only reasonable interpretation of the RCW 90.48.555(6) presumption of compliance. Consistent with the plain language of the statute, Boeing asserts that once an ISGP permittee has proceeded through all three of the Permit's corrective action levels, has repeatedly revised its stormwater pollution prevention plan, and has implemented all applicable and appropriate BMPs contained in the SWMMs (including every existing Ecology-approved treatment BMP), that permittee is presumed to be in compliance with federal and state water quality standards – *unless* there is site specific information demonstrating that a discharge causes or contributes to violation of water quality standards. *See* Boeing Opening Br. at 29-33.

This presumption of compliance is not dependent upon a permittee meeting ISGP benchmarks, or going beyond the SWMMs to devise and implement new BMPs in an attempt to meet benchmarks. RCW 90.48.555(8)(a) identifies benchmarks as one element of a permit's adaptive management plan. Discharges that exceed indicator benchmark values trigger escalating levels of corrective action requirements. *See* ISGP Condition S.8. However, neither RCW 90.48.555(6) nor any other

ambiguous; the mere fact that two or more interpretations of a statute are *conceivable* does not render a statute ambiguous. *Five Corners*, 173 Wn.2d at 305 (citing *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2004)).

section of the statute requires that permittees meet benchmarks or go outside the SWMMs in an attempt to meet benchmarks in order to be presumed in compliance with water quality standards.

Under the express language of RCW 90.48.555(6), the presumption may be rebutted where “discharge monitoring data or other site specific information demonstrates that a discharge causes or contributes to violation of water quality standards.” However, a stormwater discharge exceeding a “benchmark” value does not alone constitute site specific information rebutting the presumption of compliance. *See* Boeing Opening Br. at 37-39. In the face of site-specific evidence of a violation of water quality standards, Ecology may exercise its authority under RCW 90.48.555(9) and (10) to require a permittee to undertake additional water quality monitoring, studies or additional treatment measures, through the issuance of administrative orders, or move to an “alternative” general permit or individual NPDES permit. *See* Boeing Opening Br. at 30, 39-40. Ecology has numerous tools at its disposal – beyond the scope of the ISGP – to protect water quality.

Within the framework of the ISGP itself, Ecology cannot, consistent with the presumption of compliance, require a permittee at corrective action Level 3 that has fully implemented all applicable treatment BMPs in the SWMMs to implement additional unspecified

treatment BMPs not recognized or approved in the SWMMs solely because its stormwater discharges exceed benchmark values. *See* Boeing Opening Br. at 30, 37-39. The PCHB's holding to the contrary would rewrite RCW 90.48.555(6) so as to render meaningless the presumption of compliance with water quality standards.²

2. **The Board's, Ecology's, and PSA's interpretation of "all permit conditions" in RCW 90.48.555(6)(a) is unreasonable because it renders meaningless the presumption of compliance.**

In order to be entitled to the statutory presumption of compliance, ISGP permittees must be in full compliance with "all permit conditions" (RCW 90.48.555(6)(a)), and fully implementing BMPs contained in Ecology-approved SWMMs or demonstratively equivalent thereto (RCW 90.48.555(6)(b)). The PCHB held that RCW 90.48.555(6)(a) requires a permittee to "comply with 'all permit conditions', including those that require increasing levels of corrective actions to meet the benchmark values." CP 84. From this the Board concluded that a permittee at a Level 3 corrective action whose discharges continue to exceed

² Ecology challenges Boeing's ability to appeal the PCHB's December 23, 2010 Order on Summary Judgment (CP 113, App. M to Boeing's Opening Br.), on the grounds that the Board denied the motion due to the existence of disputed issues of material fact. Ecology Br. at 17. Boeing assigned error to the December 23, 2010 order solely because the order contained language "clarifying" the Board's opinion that the ISGP requires permittees to continue to implement additional BMPs, beyond those contained in the SWMMs, until their discharges no longer exceed benchmark values. Boeing Br. at 21 n.13. Boeing does not seek to overturn the Board's December 23, 2010 ruling denying summary judgment.

benchmarks after implementing every applicable Ecology-approved treatment BMP must continue to devise and implement unspecified BMPs beyond the SWMMs, until its discharges meet benchmarks – *even if there is no site-specific evidence of water quality violations*. CP 83-86. The Board’s circular interpretation of RCW 90.48.555(6)(a) allows imposition of a permit “condition” that completely ignores a key provision of the statute.

Ecology and PSA defend the PCHB’s ruling by mischaracterizing – and in the case of Ecology, misquoting – Boeing’s position regarding the proper interpretation of “full compliance with all permit conditions.” Ecology Br. at 12, 19-20 (“quoting” Boeing Opening Br. at 34); PSA Br. at 8-11. Contrary to respondents’ assertions, Boeing agrees that to be in “full compliance with all permit conditions” an ISGP permittee must comply with the Permit’s explicit corrective action requirements in Condition S8. *See* Boeing Opening Br. at 17-19, 35 n. 17. Boeing disagrees, however, with the PCHB’s *interpretation* of Condition S8.D to “put[] the burden on the permittee to find solutions to meet benchmarks” by implementing additional BMPs outside the SWMMs. *See* CP 104.

A permittee in “full compliance” with ISGP Condition S8 will have prepared and implemented a detailed SWPPP containing all applicable operational, source control and treatment BMPs; fully complied

with the Permit’s detailed requirements for discharge reporting, monitoring and inspections; and moved through all three escalating levels of required corrective action responses, each triggered as a result of a discharge exceeding a benchmark value, continually reviewing and, if necessary, revising its SWPPP to ensure that it contains the appropriate BMPs from the SWMMs.³ At Level 3, a permittee “in full compliance” with Condition S8.D must have implemented *all* applicable operational, source control and treatment BMPs appropriate to its particular facility – both required and recommended – contained in the SWMMs. ISGP Conditions S3, S8.

ISGP Condition S8.D does not state that a Level 3 permittee must go beyond the SWMMs to devise and implement additional, unspecified BMPs until its stormwater discharges meet the Permit’s numeric benchmark values. This so-called “condition” arises solely from the PCHB’s and Ecology’s interpretation of Condition S8.D. The ISGP utilizes “monitoring benchmarks” as only one element of the “adaptive management mechanism” required in RCW 90.48.555(8)(a).⁴ The

³ See ISGP Condition S3; see also testimony of Paul Stasch at RP 435:4-6 (“the stormwater pollution prevention plan is the foundation of the permit”).

⁴The necessary elements of the RCW 90.48.555(8)(a) “adaptive management mechanism”, including “an adaptive management indicator, such as monitoring benchmarks” define the concept of “adaptive management” relevant to this appeal. Consistent with the plain language of RCW 90.48.555(8)(a), “benchmarks” are defined in

Board's interpretation elevates benchmarks from their proper role as a "signal that a SWPPP may need adjusting" to a "condition" of the Permit. *See Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F. Supp. 2d 914, 924-25 (C.D. Cal. 2009); Boeing Opening Br. at 17-18.

If the Legislature had intended to include a requirement in RCW 90.48.555(6) that a permittee must achieve numeric benchmark values in order to be presumed to be in compliance with water quality standards, it would have said so explicitly. Instead, "benchmarks" are not even mentioned in RCW 90.48.555(6). Nothing in RCW 90.48.555 or the ISGP itself suggests that benchmarks are to be used as anything other than indicator values.

Moreover, if the legislature had intended to require that ISGP permittees devise and implement unspecified BMPs beyond those contained in Ecology-approved SWMMs until those permittees meet benchmark values, it would have included such a requirement in RCW 90.48.555(6)(b). Instead, RCW 90.48.555(6)(b) bases the presumption of compliance on implementation of all applicable and appropriate BMPs contained *in the SWMMs* (or that are demonstrably equivalent thereto).

the ISGP, ISGP Fact Sheet and in relevant case law as indicator values, the exceedance of which trigger a specific corrective action response. *See* Boeing Opening Br. at 17-18. Ecology's references to various definitions of "adaptive management" contained in unrelated Growth Management Act regulations are simply irrelevant and should be disregarded by this Court. *See* Ecology Br. at 6-7, 22.

The PCHB's interpretation is not consistent with the plain meaning of the statute. *See* Boeing Opening Br. at 35-36.

Ecology's and PSA's differing defenses of the Board's interpretation of RCW 90.48.555(6) illustrate the unreasonableness of that interpretation. Ecology asserts that the Board's interpretation of RCW 90.48.555(6) does not require permittees to meet benchmarks, and does not elevate benchmarks from an indicator value to a numeric effluent limitation, because a permittee could exceed a benchmark but still be entitled to the presumption of compliance "so long as the permittee is implementing the appropriate adaptive management response to the benchmark exceedence [sic]." Ecology Br. at 9-10, 13. PSA takes an entirely different approach, disagreeing with Ecology's position and the Board's suggestion in its final order that a permittee exceeding benchmarks could nevertheless be entitled to the presumption of compliance with water quality standards.⁵

⁵ PSA asserts that the ISGP "must require strict compliance with benchmark provisions", and "it is . . . mandated by the Clean Water Act that the Permit require corrective actions, unless and until the facility meets the benchmarks." PSA Br. at 15-16. PSA's notion of "strict compliance with benchmark provisions" is not consistent with the Board's final order. *E.g.*, CP 70 ("As we have repeatedly stated, while an exceedance of a benchmark is not, in and of itself, a violation of a water quality standard, the benchmarks are indicator values—values that are predictive of potential, or actual, water quality violations."); CP 86 ("When a permittee is taking all the steps required by the adaptive management process, as modified by this opinion, or is *in fact* meeting benchmarks of the permit, then the permittee is entitled to the presumption of compliance provided by the statute.")

Ecology's argument begs the question of what, in fact, constitutes an "appropriate adaptive management response" where the Legislature has explicitly endorsed the SWMMs as the appropriate source of BMPs to treat stormwater discharges under the ISGP, and tied the presumption of compliance with water quality standards to reliance on the SWMMs. It also begs the question of what, precisely, is the point of a statutory presumption of compliance with water quality standards, if an ISGP permittee at Level 3 would be in exactly the same position with or without the presumption.

The Board's interpretation of "all permit conditions" in RCW 90.48.555(6)(a) does not give effect to all the words in RCW 90.48.555(6). If "full compliance with all permit conditions" means that a permittee must devise and implement new BMPs outside the SWMMs until its discharges meet benchmarks, then RCW 90.48.555(6)(a) would render meaningless the more specific provisions of RCW 90.48.555(6)(b). The "presumption" would simply be without meaning or effect.

3. Respondents completely ignore the "site specific information" exception to the presumption of compliance.

RCW 90.48.555(6) explicitly states that compliance with water quality standards is presumed *unless* "discharge monitoring data or other site specific information demonstrates that a discharge causes or

contributes to a violation of water quality standards.” RCW 90.48.555(6). The Board erroneously interpreted the “site specific information” exception to the statutory presumption, ruling that the presumption is rebutted “presumably based on data or other site-specific information that demonstrates continued inability to meet the benchmarks, and the possibility of discharges that cause or contribute to a violation of water quality standards.” CP 104; CP 83. *See* Boeing Opening Br. at 37-39.⁶

In defending the PCHB’s decisions, both Ecology and PSA conspicuously omit any discussion of the “site specific information” exception to the presumption of compliance in RCW 90.48.555(6). Ecology and PSA assert that RCW 90.48.555(6)(a) and the Level 3 corrective action provisions in ISGP Condition S.8, as interpreted by the Board, constitute the sole means by which the statute ensures compliance with water quality standards. *See* Ecology Br. at 22-24; PSA Br. at 12-13. From this premise, Ecology and PSA proceed to erroneously assert that Boeing seeks to avoid meeting water quality standards, and that Boeing’s

⁶ In its final order, the PCHB acknowledged that discharge monitoring reports indicating exceedance of ISGP benchmarks “may be sufficient feedback in some circumstances, particularly with Level 1 and Level 2 actions, but they are likely inadequate in more complex situations such as Level 3 treatment BMPs.” CP 85. Ecology and PSA do not mention the Board’s characterization of discharge monitoring reports as “likely inadequate” to assess the effectiveness of Level 3 treatment BMPs. Nor do they mention the Board’s remand of the Permit to Ecology for “further refinement” of Condition S8.D to set forth an “iterative” process for determining whether additional BMPs are necessary in a Level 3 corrective action. CP 85-86.

interpretation of RCW 90.48.555(6) would allow permittees to “discharge extremely high levels of pollutants.” PSA Br. at 1, 12-13; Ecology Br. at 22-24.

That is simply not the case. RCW 90.48.555(6) clearly states that the presumption of compliance with water quality standards is not absolute. It is a *presumption*, which may be rebutted when “discharge monitoring data or other site specific information demonstrates that a discharge causes or contributes to violation of water quality standards.” RCW 90.48.555(6).

The extent to which Ecology’s and PSA’s interpretation of the statutory presumption fails to account for the entirety of the statute’s provisions is starkly illustrated by their complete failure to discuss the RCW 90.48.555(6) “site-specific information” exception. PSA’s brief contains no reference to the “site-specific information” exception in RCW 90.48.555(6). Ecology at least quotes RCW 90.48.555(6) in its entirety, but, like PSA, does not discuss the “site specific information” exception. *See Ecology Br. at 5, 17.*

Ecology’s and PSA’s briefs ignore another key point—the legislative grant of authority to Ecology, in RCW 90.48.555(9) and (10), to take additional regulatory action whenever it determines that compliance with the ISGP is or may be inadequate to protect water

quality. In such circumstances Ecology may require that a permittee undertake additional water quality monitoring, water quality studies, or additional treatment measures. RCW 90.48.555(10). Ecology may do so by issuing administrative orders, “alternative” general permits, or individual permits. *Id.*⁷ See Boeing Opening Br. at 39-40. Ecology referenced this authority in the ISGP Fact Sheet, in the context of explaining why it chose to omit a proposed Level 4 corrective action from the final ISGP, and reaffirmed its authority in testimony before the Board.⁸

Neither Ecology nor PSA acknowledges the significance of Ecology’s authority to act outside the scope of the ISGP to prevent violations of water quality standards. PSA’s brief contains no reference to RCW 90.48.555(9) or (10). Ecology’s only reference to its own authority

⁷ Ecology’s regulations detail the circumstances under which the agency may terminate general permit coverage, move a permittee from a general to an individual permit, or obtain coverage under a different more specific general permit. *E.g.*, WAC 173-226-080(1)(e) (director may terminate coverage under a general permit for cause); WAC 173-226-080(1)(f) (director may “require any discharger to apply for and obtain an individual permit, or to apply for and obtain coverage under another more specific general permit”); WAC 173-226-080(1)(g) (circumstances under which general permits may be terminated); WAC 173-226-230 (circumstances under which general permit may be modified, revoked and reissued, or terminated); WAC 173-226-240 (circumstances under which general permit may be terminated, a discharger may be required to apply for and obtain an individual permit or apply for and obtain coverage under another more specific general permit).

⁸ See Boeing Opening Br. at 21; see also RP 562:20 – 563:18; 565:5-10 (testimony of Mark Kaufman that Ecology uses RCW 90.48.080 as a “regulatory backstop” to halt pollution, independent of any stormwater general permit regime).

to take action to protect water quality under RCW 90.48.555(9) and (10) is contained in a footnote. Ecology Br. at 5 n.2.

Even when a permittee is presumed to be in compliance with water quality standards, if Ecology has site specific evidence demonstrating otherwise, it has the authority to take action to ensure that discharges do not violate water quality standards. Such actions may or may not involve termination of general permit coverage and a move to an individual NPDES permit, and could potentially involve requiring, through an administrative order, that an industrial facility implement BMPs beyond those contained in the SWMMs. But such Ecology action, under the express language of the statute, must be based on site specific information – i.e., not solely on benchmark exceedances – and must occur by means of an administrative order pursuant to RCW 90.48.555(10). *See Boeing Opening Br.* at 37-41.

Requiring Ecology to give full effect to the RCW 90.48.555(6) presumption of compliance for ISGP permittees at the Level 3 corrective action stage will not result in violation of water quality standards. Rather, it will foster clarity and predictability, assuring most permittees that they can comply with the ISGP by relying upon Ecology’s SWMMs for stormwater best management practices – exactly as envisioned by the Legislature. The RCW 90.48.555(6) “site-specific information” exception

to the presumption, properly applied, together with the authority given to Ecology in RCW 90.48.555(9) and (10), will ensure compliance with water quality standards.

4. RCW 90.48.555(6)(b) and the SWMMs are not intended to ensure compliance solely with technology-based requirements.

Ecology and PSA contend that the only purpose of RCW 90.48.555(6)(b) and the SWMMs is to ensure compliance with *technology-based* effluent limitations. *See* Ecology Br. at 21-22; PSA Br. at 12-14. From this, they conclude that Boeing's interpretation of the statute would grant permittees a presumption of compliance with water quality standards based only on compliance with technology-based effluent limitations, and would excuse permittees from complying with water quality-based effluent limitations. *Id.*

PSA and Ecology attempt to manufacture a distinction between subsections (6)(a) and (6)(b) that simply does not exist. *See, e.g.,* PSA Br. at 1, 8-9. Their interpretation of the statute is contrary both to the language of the statute itself, and to the SWMMs and Ecology's 2003 Policy Statement setting forth Ecology's long-held "presumptive" approach to compliance with both technology-based and water quality-based limitations. Boeing fully acknowledges that ISGP permittees must comply both with technology-based and water quality-based effluent

limitations. Boeing's interpretation of the statute would not allow permittees to avoid compliance with water quality-based effluent limitations.

Again, PSA and Ecology seek to rewrite RCW 90.48.555(6). Subsection (a) of that statute contains no language limiting its effect to compliance with water quality-based effluent limits, and subsection (b) contains no language limiting its effect to compliance with technology-based effluent limits. Moreover, as explained above, RCW 90.48.555(6)(a) is not the sole means by which RCW 90.48.555 ensures compliance with water quality standards.

In interpreting RCW 90.48.555, this Court must look to the context in which the statute appears. *Flight Options v. Dep't of Revenue*, 172 Wn.2d 487, 501, 259 P.3d 234 (2011). The Legislature enacted RCW 90.48.555 just one year after Ecology issued its 2003 Policy Statement regarding the intended purpose and use of the SWMMs (WSR 03-15-091, App. F to Boeing Opening Br.). Ecology's Policy Statement plainly states that the SWMMs and other Ecology-approved technical guidance documents are intended to provide permittees with a compilation of approved BMPs "which are *presumed* to protect water quality and satisfy

the state AKART requirement.” WSR 03-15-091 (July 18, 2003) at 1.⁹

Ecology’s Policy Statement does *not* state that the SWMMs are intended to ensure compliance solely with technology-based requirements.¹⁰

In addition to the plain language of the statute, the SWMMs further support Boeing’s interpretation of RCW 90.48.555(6), and not that of the Board, Ecology, or PSA. Ecology describes its “presumptive approach” in the SWMMs “as provid[ing] a default set of stormwater practices based on current science *which satisfy State and Federal stormwater requirements.*”

Ex. B-49B (App. C to Boeing Opening Br.) at 1-9 (emphasis supplied);

see Boeing Opening Br. at 11-14, 31-33. The SWMM for Western

Washington also states:

This manual establishes minimum requirements for development and redevelopment projects of all sizes and provides guidance concerning how to prepare and implement stormwater site plans. These requirements are, in turn, satisfied by the application of BMPs from Volumes II through V. Projects that follow this

⁹ The Policy Statement also states that if the BMPs in the SWMM “are implemented correctly, [Ecology] believes they should result in compliance with existing regulatory requirements for stormwater – including compliance with the Federal Clean Water Act, Federal Safe Drinking Water Act and State Water Pollution Control Act.” *Id.* The “existing regulatory requirements for stormwater” clearly includes both water quality-based and technology-based requirements.

¹⁰ PSA’s attempt to explain away the Policy Statement misunderstands its relevance to the proper interpretation of RCW 90.48.555(6). *See* PSA Br. at 13. Ecology’s Policy Statement is relevant not because it is “persuasive” but rather because Ecology’s statement regarding the purpose and effect of the SWMMs establishes the context in which the Legislature enacted RCW 90.48.555. The Policy Statement informed the Legislature’s decision to base the presumption of compliance with water quality standards on the implementation of BMPs contained in Ecology’s SWMMs. Notably, Ecology’s brief makes no reference whatsoever to the Policy Statement.

approach will apply reasonable, technology-based BMPs *and water quality-based BMPs* to reduce the adverse impacts of Stormwater.

Ex. B-49B at 1-1 (emphasis added). Ecology's selective quotation from the same page of Exhibit B-49B (Ecology Br. at 22 n.9) incorrectly implies that the BMPs in the SWMMs are not water quality-based.

Similarly, Ecology's selective quotation from page 1-7 of Exhibit B-49B (Ecology Br. at 21-22) omits the immediately preceding sentence describing the purpose of the BMPs in the SWMMs, to wit: "These measures are considered to be necessary *to achieve compliance with State water quality standards* and to contribute to the protection of the beneficial uses of the receiving waters (both surface and ground waters)."

Ex. B-49B at 1-7 (emphasis added). Nowhere do the SWMMs state that implementing the BMPs therein would give rise to a presumption of compliance with *only* technology-based requirements.

Statements in the SWMMs to the effect that the presumptive approach will not always result in adequate protection of water quality, and that additional measures may sometimes be necessary to protect water quality, do not "eviscerate" Boeing's characterization of the SWMMs as informing the Legislature's intent when it enacted the presumption of compliance in RCW 90.48.555(6). *See* PSA Br. at 12-13; Ecology Br. at 21-22. Rather, these statements in the SWMMs are entirely consistent

with Boeing's interpretation of the statute. The extensive and detailed set of BMPs contained in the SWMMs are only *presumed*, and not *guaranteed*, to lead to compliance with water quality standards, which is exactly why the statutory presumption may be rebutted upon site-specific evidence that implementation of the BMPs in the SWMMs are inadequate to protect water quality. There is simply no basis for Ecology's and PSA's assertions that RCW 90.48.555(6)(b) and the SWMMs are concerned solely with technology-based requirements.¹¹

B. The Fecal Coliform Effluent Limitation Issue Is Moot.

Boeing agrees with Ecology that the issues raised on appeal regarding the PCHB's rulings on the fecal coliform effluent limit have been rendered moot by the Legislature's recent amendment of RCW 90.48.555(7)(a). *See Ecology Br. at 24-26.* Boeing accordingly withdraws its Assignments of Error Nos. 4, 5 and 6, and Issues 2 through 4. *See Boeing Opening Br. at 4-7.*

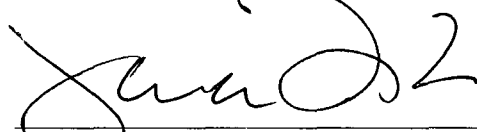
¹¹ PSA's assertion that Boeing seeks an "automatic offramp" is unfounded. PSA Brief at 16-17. Boeing's position is that the presumption of compliance with water quality standards arises only when a permittee has fulfilled all of the requirements set forth *supra* at 7-8, and is rebutted when site-specific evidence demonstrates that discharges cause or contribute to a violation of water quality standards. RCW 90.48.555(6). In the event of an actual or potential water quality violation, the "offramp" is for Ecology to exercise its authority to issue an administrative order requiring additional actions by the facility, to terminate Permit coverage, to issue an alternative general permit, or issue an individual NPDES permit. RCW 90.48.555(9), (10). Such actions, outside the confines of the Permit, provide the clarity and regulatory predictability that Boeing seeks within the ISGP itself.

III. CONCLUSION

For the foregoing reasons, Boeing respectfully urges this Court to set aside and remand the Board's summary judgment rulings and final order regarding the presumption of compliance with water quality standards for ISGP permittees at Level 3.

RESPECTFULLY SUBMITTED this 29th day of May, 2012.

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A handwritten signature in black ink, appearing to read 'James A. Tupper', is written over a horizontal line.

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